Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

EUGENE E. SHANKS, SR., d/b/a Fliteline Maintenance, Inc.; FARM AND RANCH AERIAL APPLICATOR SERVICES, INC.; and GULF COAST AG, INC.,

Petitioners,

v.

ALLIEDSIGNAL, INC.; ED ADHERNS; JERRY TORRENCE; PETER BAKER; and SANDY MEOUR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The NTSB is an independent agency of the government with its central purpose to promote safety in transportation. The NTSB has no regulatory or enforcement powers of its own. *See*, Independent Safety Board Act of 1974, *as amended* 49 U.S.C. §§ 1101-1155 (1998). NTSB aircraft accident investigations include the field investigation, report preparation, and, where ordered, the public hearing. Accident investigations are fact finding proceedings with no formal issues and no adverse parties, and are not subject to the provisions of the Administrative Procedure Act (Pub. L. 89-554, 80 Stat. 384 (5 U.S.C. § 554 *et seq.*)). Such investigations are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. § 831 (2001). Further, the federal courts have repeatedly asserted the doctrine of federal preemption, particularly in the field of aviation. Yet, Texas common law standards were used in holding that an NTSB aircraft accident investigation is a quasi-judicial proceeding.

The primary question presented is whether an NTSB aircraft accident investigation is correctly characterized as a quasi-judicial proceeding with the resulting grant of judicial immunity incident to such a characterization and given to the party participants to such accident investigations. The secondary question presented is whether or not Texas common law can be properly used to interpret the nature of NTSB aircraft accident investigations.

STATEMENT PURSUANT TO RULE 29.6

Petitioners, Fliteline Maintenance, Inc., Farm and Ranch Aerial Applicator Services, Inc. and Gulf Coast AG, Inc., have no corporate parents, and no publicly held company owns 10% or more of the stock of any such corporate Petitioner.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The District Court's memorandum and order denying Respondents' motion for summary judgment (Appendix ("Pet. App.") 42a) was not published. The Court of Appeals vacated the District Court's order, and remanded the case to the District Court for further proceedings. The Circuit Court's opinion and order are published at *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 1999 (5th Cir. Tex. 1999).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on July 16, 2001. No motion for rehearing was filed. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Independent Safety Board Act of 1974, as amended 49 U.S.C. §§ 1101-1155 (1998), and more specifically the nature of such investigations as codified in 49 C.F.R. § 831.4 (2001) and which is relevant to this petition are reprinted below (Appendix 51a).

STATEMENT OF THE CASE

On March 31, 1994, Petitioners sued Respondents for defamation, tortuous interference with business relations, negligence, unfair trade practices, intentional and negligent infliction of emotional distress, fraud, and civil conspiracy. On February 27, 1997, Respondents moved for judgment on the pleadings or, in the alternative, for summary judgment

on the grounds that an NTSB aircraft accident investigation is a quasi-judicial proceeding, and, therefore, they are entitled to absolute immunity relative to their participation in the investigation. On August 1, 1997, the District Court denied Respondents' motion for summary judgment. Respondents claimed a right for interlocutory appeal based upon collateral order doctrine related to 28 U.S.C.S. § 1291 (1997). On April 23, 1999, the Fifth Circuit vacated the District Court's denial of Respondents' motion for summary judgment, and remanded the case for further consistent proceedings where it concluded that Respondents were a party to an agency investigation, that the agency served a quasi-judicial function, and that Respondents could assert absolute immunity from tort actions arising from communications about the investigation. On May 20, 2000, Respondents filed another motion for summary judgment. On August 3, 2000, the District Court granted Respondents' motion for summary judgment. On August 30, 2000, Petitioners appealed. On July 16, 2001, the Fifth Circuit affirmed the District Court's granting of Respondents' motion for summary judgment. The Fifth Circuit's opinion was not published.

The Court of Appeals' holding merits this Court's immediate review because it will grant absolute immunity to any party participating in aircraft accident investigations. Such parties are almost always aircraft manufacturers or component manufacturers who have their financial self interests in mind when participating in such aircraft accident investigations. The public's interest in aviation safety cannot possibly be served by extending absolute immunity to those who are primarily involved in lending expertise to the investigation, while at the same time obviously participating in anticipation of defending their product in further personal injury litigation.

1. Beginning around 1978, Petitioners and Respondents became competitors in the business of repairing and maintaining engines of the type manufactured by Respondents.

2. On May 14, 1992, an agricultural airplane crashed killing the pilot, Billy Kenney. On June 4, 1992, Respondents were made a party participant to the NTSB investigation of this accident. On June 4, 1992, an engine tear down was conducted at Respondents' facility in Houston, Texas. Respondents were asked to submit a factual report of the engine tear down, and did so on August 12, 1992. Respondents were the only party to the investigation with any expertise in the operation and design of the engine in question.

3. On January 13, 1993, the NTSB issued a probable cause determination that was mechanically impossible. The January 1993 Probable Cause Determination was: "The NTSB determines that the Probable Cause(s) of this accident was:

> A LOSS OF CONTROL DURING A PROPELLER UNDERSPEED CONDITION WHICH RESULTED IN A STALL. THE UNDERSPEED CONDITION WAS CAUSED BY A SPEEDER SPRING FAILURE ***AND*** A BINDING BOGUS PROPELLER PITCH CONTROL CAM. THE AIRPLANE WAS IMPROPERLY MAINTAINED."

This was a mechanically impossible determination. This determination, in essence, blamed Petitioners for causing the accident, and conversely exonerated Respondents for causing the accident. Of those involved in the accident investigation, only Respondents could have known and did in fact know at the time that the January 13, 1993 determination was

mechanically impossible. However, Respondents failed to do or say anything at that point. Respondents, in essence, instead of lending expertise to the investigation, used the investigation to destroy a competitor.

4. On October 18, 1994, Petitioners filed a Petition for Reconsideration with the NTSB. As required by statute, Petitioners served Respondents with a copy of Petitioners' Petition for Reconsideration. Respondents neither joined nor responded to Petitioners' Petition for Reconsideration.

5. On December 23, 1996, in response to Petitioners' Petition or Reconsideration, the NTSB issued its revised Probable Cause Determination. The NTSB revised the Probable Cause to:

> THE ***PILOT'S FAILURE TO MAINTAIN ADEQUATE AIRSPEED***, RESULTING IN AN INADVERTENT STALL AND COLLISION WITH TERRAIN.

(Emphasis added.)

6. On July 2, 1997, Respondents also revealed that they knew that the January 1993 Probable Cause Determination was mechanically impossible.

7. As a result of the erroneous 1993 probable cause determination, Petitioners suffered loss of business, were subjected to numerous civil lawsuits including the wrongful death lawsuit which is still pending in which both Petitioners and Respondents are still parties, plus Petitioners were made the lead story of an ABC Prime Time Live broadcast for having allegedly killed for profit the pilot of the crashed aircraft.

8. The NTSB's January 1993 Probable Cause Determination led to Eugene E. Shanks being indicted on June 2, 1993. The indictment had eight felony counts including one count that carried a potential death sentence for Eugene E. Shanks. Several months after the indictment, the Assistant United States Attorney who prosecuted the criminal case against Eugene E. Shanks came to nderstand that the January 1993 Probable Cause Determination was mechanically impossible.

9. On December 9, 1993, at the re-arraignment of Eugene E. Shanks, Assistant United States Attorney, Julie Stern, who prosecuted and settled the criminal case against Eugene E. Shanks, stated to the District Court,

> FURTHER, IN THE PLEA AGREEMENT THE UNITED STATES BRINGS TO THE COURT'S ATTENTION THAT REGARDING COUNT SEVEN, IT BECAME CLEAR THAT THE UNITED STATES COULD NOT PROVE BEYOND A REASONABLE DOUBT THAT THE PROP PITCH CONTROL CAM THAT THE DEFENDANT PLACED ON THE KENNEY AIRPLANE WAS A CONTRIBUTING CAUSE OF THE CRASH. ORIGINALLY, WE HAD RECEIVED A REPORT FROM THE NATIONAL TRANSPORTATION SAFETY BOARD THAT INDICATED IT WAS, AND UPON SUBSEQUENT INVESTIGATION BY EXPERTS FROM BOTH SIDES, ***IT WAS DETERMINED THAT IT WAS NOT A CAUSE OF THE CRASH.***

(Emphasis added.)

10. Respondents finally admitted, six years after the fact, that they knew the NTSB's January 1993 Probable Cause Determination was wrong. AlliedSignal now says:

> In fact, the evidence will ultimately show that AlliedSignal informed representatives of the NTSB, soon after reviewing the initial probable-cause statement, ***that the NTSB's theory of the accident was impossible from a technical point of view.***

(Emphasis added.)

REASONS FOR GRANTING THE WRIT

11. The petition should be granted for three reasons. First, when read as a whole, it is clear that Congress did not intend that the Independent Safety Board Act of 1974 would deem aircraft accident investigations as quasi-judicial proceedings. Second, giving an NTSB aircraft accident investigation, and, in particular, the party participants of such an investigation, absolute immunity is contrary to the public interests in promoting aviation safety. As pointed out in a recent Rand Institute study on the NTSB party participant system, there is an inherent conflict of interest between party participants and the public interest. Third, the Fifth Circuit's decision using Texas common law to interpret the federal statute is contrary to the doctrine of federal preemption particularly in the realm of aviation regulation.

I.

The Fifth Circuit's Decision to Characterize an NTSB Aircraft Accident Investigation as Quasi-Judicial Is Contrary to the Statutory Intent, and Clearly Damages an Already Precarious Party Participant System That the NTSB Must Rely Upon in Conducting Aircraft Accident Investigations.

12. The NTSB opened its doors on April 1, 1967. Although independent, it relied on the U.S. Department of Transportation (DOT) for funding and administrative support. In 1975, under the Independent Safety Board Act, all organizational ties to DOT were severed. The NTSB is not part of DOT, or affiliated with any of its modal agencies. Since its inception in 1967, the NTSB has investigated more than 100,000 aviation accidents and thousands of surface transportation accidents. In so doing, it has become the world's premier accident investigation agency. On call 24 hours a day, 365 days a year, NTSB investigators fly to every corner of the world to investigate significant accidents.

See NTSB Web Site, Internet at *http://www.ntsb.gov*

13. The NTSB is charged by Congress with investigating every civil aviation accident in the United States and significant accidents in the other modes of transportation — railroad, highway,

> marine and pipeline — and issuing safety recommendations aimed at preventing future accidents. The rules of the Board are located in Chapter VIII, Title 49 of the Code of Federal Regulations. The NTSB is responsible for the organization, conduct, and control of accident investigations involving civil aircraft in the United States.

49 C.F.R. § 831.2(a)(1) (2001).

> "Accident and incident investigations are conducted by the Board to determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents or incidents in the future. The investigation includes the field investigation (on-scene at the accident, testing, teardown, etc.), report preparation, and, where ordered, a public hearing. The investigation results in Board conclusions issued in the form of a report or "brief" of the incident or accident. Accident/incident investigations are fact finding proceedings ***with no formal issues and no adverse parties and are not subject to the provisions of the Administrative Procedure Act*** (Pub. L. 89-554, 80 Stat. 384 (5 U.S.C. 554 et seq.)). Such investigations are not conducted for the purpose of determining the rights or liabilities of any person."

49 C.F.R. § 831.4 (2001) (Emphasis added). That is, the purpose of an NTSB investigation is to determine what happened, and

how to prevent it from happening again, not to render a judgment or determine legal rights.

14. By statute, the NTSB's only quasi-judicial function is appellate review of FAA enforcement actions. When the NTSB is exercising its role in investigating aircraft accidents, it is not acting in a judicial or quasi-judicial capacity. When the NTSB acts in an adjudicative function, it is considered to be acting in a quasi-judicial capacity pursuant to 49 C.F.R. § 800.3(b) (2001), which states,

> (b) "Upon application of affected parties, the *Board reviews in quasi-judicial proceedings, conducted pursuant to the provisions of the Administrative Procedure Act.*, 5 U.S.C. 551 et seq., denials by the administrator of the Federal Aviation Administration of applications for airman certificates and orders of the Administration modifying, amending, suspending, or revoking certificates. The Board also reviews on appeal the decisions of the Commandant, U.S. Coast Guard, on appeals from orders of administrative law judges suspending, revoking, or denying seamen licenses, certificates, or documents."

(Emphasis added).

15. The bare possibility that a quasi-judicial proceeding might be instituted by the FAA at sometime after an aircraft accident investigation, should not confer quasi-judicial status to an NTSB aircraft accident investigations.

16. NTSB recommendations are made to promote safety in transportation, but are not made in anticipation of legislation. "The NTSB has issued almost 10,000

recommendations in all transportation modes to more than 1,250 recipients. Since 1990, the NTSB has highlighted some issues on a Most Wanted list of safety improvements" (A copy of the Most Wanted list may be obtained elsewhere on the NTSB's Home Page). Although it has no regulatory or enforcement powers, its reputation for impartiality and thoroughness has enabled the NTSB to achieve such success in shaping transportation safety improvements that more than 80 percent of its recommendations have been adopted by those in a position to affect change. See NTSB Web Site, Internet at http://www.ntsb.gov.

> (a) The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of: all accidents involving civil aircraft, . . . The Board makes transportation safety recommendations to Federal, State, and local agencies and private organizations to reduce the likelihood of recurrences of transportation accidents.

See 49 C.F.R. § 800.3 (2001).

II.

The Fifth Circuit's Decision Fails to Consider the Vastly Different Public Policy Implications for Granting Absolute Immunity in a Quasi-Judicial Context and the Mission of the NTSB to Promote Air Safety.

17. In mid 1998, Jim Hall, Chairman of the NTSB, commissioned the Rand Corporation to study the NTSB investigative process and in particular the party system. In late December 1999, the Rand Corporation's Institute for Civil Justice issued its report which is entitled Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations. The Rand Corporation's Institute for Civil Justice is a well respected think tank.

18. The study is revealing and candid about the crisis faced by the NTSB given its limited resources, including the inherent conflict of interest present in the party participant process. The study's findings beginning on page 19 have a ring of urgency.[1] The summary of the Rand study candidly discusses today's environment faced by the NTSB. The study's overview then discusses the party process.[2]

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1. "In significant ways, the NTSB is already at or near the breaking point. Avoiding the breakdown will require the cautious infusion of additional resources, redesign of internal NTSB practices, and exemplary leadership."

2. "This centrality of the party process reflects an appreciation, on the part of legislators and other policymakers, that an agency capable of operating with complete autonomy would be impossibly large, unwieldy, and costly considering the diversity of accidents that the safety board is

(Cont'd)

The District Court failed to address the inherent conflict of interest faced by the NTSB that is so dramatically revealed in this lawsuit. The Rand report also addresses the inherent conflict of interest in the party system.[3]

19. Just such a conflict of interest exists between Petitioners and Respondents. The events and law at issue in this lawsuit did not serve the NTSB's objectives nor the flying public's interests because a mechanically impossible probable cause determination was issued. How could that have served the public's interest in air safety? How many others have died because Respondents corrupted the investigation

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(Cont'd)

> called upon to investigate. The NTSB must work with parties involved in a crash; there is insufficient in-house expertise within the agency itself. However, this presents a ***clear and present danger to the integrity of the investigative process*** — parties that face potentially enormous economic losses if they are found to be the cause of an accident could attempt to disrupt or bias an investigation."

(Emphasis added.)

3. "However the reliability of the party process has always had the potential to be compromised by the fact that the parties most likely to be named to assist in the investigation are also likely to be named defendants in related civil litigation. This inherent conflict of interest may jeopardize, or be perceived to jeopardize, the integrity of the NTSB investigation."

motivated by self-interest? Granting quasi-judicial status and absolute immunity only does further harm. Further harm to all that fly in aircraft that they trust are as safe as possible.

III.

The Doctrine of Federal Preemption Precludes Analysis based primarily on Texas Common Law.

20. The Fifth Circuit's legal analysis focuses almost exclusively on Texas common law regarding quasi-judicial proceedings to interpret the Independent Safety Board Act of 1974. Petitioners believe that such focus conflicts with the general notion of federal preemption, which is particularly prevalent in the field of aviation. Certain areas, like economic regulation of interstate air commerce, are explicitly foreclosed to the states by federal statute. *See* 49 U.S.C.S. § 40103 (1998). Other areas, such as safe operation of aircraft in civil airways, have been preempted by the enactment of a pervasive scheme of federal regulation. *United States v. Blue Ash, Ohio*, 621 F.2d 227 (1980).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20798

EUGENE E. SHANKS, SR., doing business as Fliteline Maintenance, Inc., doing business as Fliteline Maintenance; FARM AND RANCH AERIAL APPLICATOR SERVICES, INC.; GULF COAST AG, INC.; FLITELINE MAINTENANCE, INC.,

Plaintiffs-Appellants,

versus

ALLIEDSIGNAL, INC., doing business as Garrett Engine Division; ED ADHERNS, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc.; JERRY TORRENCE, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc.; PETER BAKER, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc.; SANDY MEOUR, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(H-94-CV-1906)

Appendix A

Before KING, Chief Judge, BARKSDALE, Circuit Judge, and NOWLIN, District Judge.[1]

PER CURIAM:[2]

Having considered the briefs and pertinent parts of the record, and having heard oral argument, and essentially for the reasons stated by the district court in its comprehensive and well-reasoned opinion, the judgment is

AFFIRMED.

---

1. District Judge of the Western District of Texas, sitting by designation.

2. Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should *not* be published and is *not* precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20798
D.C. Docket No. H-94-CV-1906

EUGENE E. SHANKS, SR, doing business as Fliteline Maintenance Inc, doing business as Fliteline Maintenance; FARM AND RANCH AERIAL APPLICATOR SERVICES INC; GULF COAST AG, INC.; FLITELINE MAINTENANCE INC

Plaintiffs – Appellants,

v.

ALLIEDSIGNAL INC, doing business as Garrett Engine Division; ED ADHERNS, doing business as Garrett Engine Division, doing business as Alliedsignal Inc; JERRY TORRENCE, doing business as Garrett Engine Division, doing business as Alliedsignal Inc; PETER BAKER, doing business as Garrett Engine Division, doing business as Alliedsignal Inc; SANDY MEOUR, doing business as Garrett Engine Division, doing business as Alliedsignal Inc

Defendants – Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston.

Appendix A

Before KING, Chief Judge, BARKSDALE, Circuit Judge, and NOWLIN*, District Judge.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: AUG 07 2001

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* District Judge of the Western District of Texas, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED AUGUST 3, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1906

EUGENE E. SHANKS, SR. d/b/a FLITELINE MAINTENANCE,

Plaintiff,

v.

ALLIEDSIGNAL, INC. d/b/a GARRETT ENGINE DIVISION, *et al.*,

Defendants.

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment (Docket #75). After considering the motion, the response, and the applicable law, the Court concludes that the motion should be GRANTED.

BACKGROUND

On May 14, 1992, an agriculture aircraft crashed in rural Louisiana, killing the pilot, Billy Kenney. The aircraft

Appendix B

(the "Kenney airplane") had been manufactured by Defendant Garrett Engine Division of AlliedSignal, Inc. ("Allied")[1] and maintained by Plaintiff Eugene E. Shanks, Sr. ("Shanks"), doing business as Fliteline Maintenance. During 1992 and 1993, the National Transportation Safety Board ("NTSB") investigated the accident with the participation and assistance of Allied and issued a probable cause statement concluding that the crash was caused by improper maintenance of the aircraft.

Thereafter, on May 24, 1993, Shanks was indicted by a federal grand jury on six counts of falsifying records and two counts of supplying false information that endangered the safety of an aircraft. The indictment included allegations arising from the crash of the Kenney airplane, but was not limited to Shanks' activities regarding that particular plane. On December 9, 1993, Shanks entered into a plea agreement with the government, pleading guilty to two counts of making false statements in records within the jurisdiction of the Federal Aviation Administration ("FAA"). The government dismissed the remaining counts of the indictment including the charge that Shanks had made false statements in connection with the Kenney airplane that resulted in its crash.

On June 2, 1993, the FAA issued two emergency revocation orders, revoking Shanks' airman mechanic certificate and Flightline's air agency certificate for falsifying records and improperly maintaining aircraft. Shanks and Flightline appealed these orders and they eventually settled with the FAA; however, Shanks did not receive a new airman mechanic certificate.

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1. References to "Allied" herein refer to Defendants collectively.

Appendix B

In October of 1994, Shanks filed a petition for reconsideration with the NTSB asking the NTSB to revise its January 13, 1993 probable cause determination with respect to the cause of the Kenney airplane crash. On December 22, 1996, the NTSB revised its statement and found that the accident was caused by pilot error, not improper maintenance.

Shanks sued Allied and various Allied agents in state court for their participation in the NTSB investigation. That action was removed to this court on June 6, 1994. Originally, Shanks asserted causes of action against the defendants for defamation, tortious interference with business relations, negligence, unfair trade practices, intentional and negligent infliction of emotional distress, fraud, and civil conspiracy. Shanks also claimed that he was defamed by Defendant Sandy Meour, who allegedly announced on February 2, 1994 that an FAA Airworthiness Directive was imminent which could require a conformity check on any engine ever worked on by Shanks.

Allied moved for summary judgment on Shanks' causes of action arguing that they fail as a matter of law because the communications in question were absolutely privileged. Allied and Meour argued that Shanks' claim against Meour failed as a matter of law because it was true.

On August 1, 1997, this Court denied Allied's motion for summary judgment. The Court decided that the NTSB investigation was not a quasi judicial proceeding under Texas law and as a result Allied could not assert absolute immunity as a defense. That ruling was appealed to the Fifth Circuit,

and in 1999, the Fifth Circuit issued an opinion vacating this Court's denial of summary judgment.

The Fifth Circuit, relying upon *Reagan v. Guardian Life Ins.*, 140 Tex. 105, 166 S.W.2d 909, 912 (1942), determined that the NTSB investigation was a quasi judicial proceeding. Accordingly, Allied is absolutely immune from suit for statements made during the NTSB investigation. The Fifth Circuit left open two questions now relevant: (1) whether immunity barred all causes of action arising from communications during a quasi-judicial proceeding, or simply defamation; and (2) whether the conduct complained of by Shanks exceeded the scope of the NTSB investigation. The Fifth Circuit then remanded the case back to this Court.

Since the case was remanded, Shanks has amended his complaint. He now more specifically alleges that he suffered harm as the result of Allied's negligence and he provides eighteen different examples of allegedly actionable conduct. Included in his negligence claim, are allegations that Allied did not perform appropriate tests with respect to its involvement in the Kenney airplane investigation, and damaged evidence that may have exonerated him. As additional bases for his negligence claim, Shanks contends that Allied did not inform the NTSB, the Department of Transportation Inspector General's Office ("DOT/OIG"), the United States Attorney's Office, the FAA, or the public, including ABC News, about possible exculpatory information that would have tended to show that Shanks' conduct was not a probable cause of the Kenney airplane crash. He also retains his defamation claim against Meour for statements made during a 1994 trade show.

Appendix B

In response to Shanks' amended complaint, Allied has filed a second partial motion for summary judgment, arguing that it is entitled to judgment as a matter of law on Shanks' negligence claim. First, Allied contends that Shanks' has dubbed his claim a "negligence" claim but in essence it is a claim for malicious prosecution, for which he cannot meet the elements as a matter of law. Second, Allied maintains that it fails as matter of law as a negligence claim because Allied is either entitled to absolute immunity or the requisite elements of a negligence claim do not exist. Shanks, of course, disputes these contentions.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Disputes about material facts are "genuine," as contemplated by the federal rule, if the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"For any matter on which the non-movant would bear the burden of proof at trial . . ., the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Transamerica Ins. Co. v. Avenell*,

66 F.3d 715, 718-19 (5th Cir. 1995). In satisfying this burden, the non-movant "may not rest upon the mere allegations or denials of the [non-movant's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex*, 477 U.S. at 324-27.

ABSOLUTE IMMUNITY

"Texas law grants absolute immunity from suit for statements made during [NTSB] investigations." *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 995 (5th Cir. 1999). Since the Fifth Circuit ruling, Shanks has amended his complaint to assert a more specific claim for negligence; however, if his negligence claim is merely a restatement of his defamation claim, Allied is nonetheless entitled to immunity. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994); *see also Shanks*, 169 F.3d at 995, n.8 (addressing the Texas Supreme Court's holding in *Bird* and its unwillingness to allow a plaintiff "to circumvent the policy behind absolute immunity merely by pleading creatively.").

The Texas Supreme Court has held that where a negligence claim is "virtually indistinguishable" from a defamation claim, and the damages sought "are basically defamation damages," the privilege afforded defamatory statements made during the course of a judicial or quasi-judicial proceeding applies. *Bird*, 868 S.W.2d at 771-72. In *Bird*, the plaintiff sued a psychiatrist for negligently concluding that the plaintiff was abusing his child. The psychiatrist submitted this conclusion to the court during custody proceedings in the form of an affidavit. The Court held that the plaintiff did not have a negligence cause of

action against the psychiatrist for his misdiagnosis of child abuse, and the affidavit was absolutely privileged. *See Bird*, 868 S.W.2d at 772. In a case distinguished by the *Bird* Court, *James v. Brown*, 637 S.W.2d 914 (Tex. 1982), the Court held that absolute immunity did not preclude a plaintiff, who had been involuntarily committed to a hospital, from suing the doctors who diagnosed her as a danger to herself and others, for negligence, i.e., medical malpractice. *See James*, 637 S.W.2d at 917 ("While the doctors' communications to the court of their diagnoses of Mrs. James' mental condition, regardless of how negligently made, cannot serve as the basis for a defamation action, the diagnoses themselves may be actionable on other grounds.").

As discussed in footnote 8 of the *Shanks* opinion, lower Texas courts have struggled with the issue of extending immunity to other causes of action aside from defamation. *See Shanks*, 169 F.3d at n.8. After considering the case law, the Court concludes that the distinction between *Bird* and *James* lies in the availability of an independent basis for relief for the asserted cause of action. That is, where the plaintiff's cause of action, negligence in this case, exists independently of the privileged communications, the plaintiff is not precluded from asserting its claim by absolute immunity; however, where the plaintiff's claim arises from the privileged communications, that claim is barred. *See Laub v. Pesikoff*, 979 S.W.2d 686, 692 (Tex.App. – Houston [1st Dist.] 1998, *writ denied*); *Crain v. The Unauthorized Practice of Law Comm. of the Supreme Court of Texas*, 11 S.W.3d 328, 335 (Tex.App. – Houston [1st Dist.] 2000, *rule 53.7 motion filed*).

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In *Bird*, the Court specifically held that "a mental health professional owes no professional duty of care to a third party to not negligently misdiagnose a condition of a patient." *Bird*, 868 S.W.2d at 772. Thus, in *Bird*, there was no negligence cause of action aside from the negligently made diagnosis communicated to the court by affidavit; the injuries suffered by the plaintiff were the result of the communication of allegedly false information to the court. In contrast, in *James*, the plaintiff was also the patient, who could incur injuries as a result of her doctor's misdiagnosis of her. A malpractice claim at issue in *James* could exist apart from the damages incurred as a result of the privileged communication. *See James*, 637 S.W.2d at 918 ("Mrs. James is not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings.").

This Court concludes that the rule espoused in *Bird* applies here. Shanks contends that Allied was negligent in reaching its conclusion by failing to perform certain tests and by failing to inform the NTSB, the United States Attorney's Office, the FAA, the DOT/OIG, and the public, that the NTSB's initial probable cause determination was incorrect.[2] These failures or omissions on the part of Allied

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2. Shanks alleges that Allied was negligent when it failed to preserve evidence analyzed during the investigation, failed to conduct certain tests or reveal the results of those tests to the NTSB, failed to inform anyone at NTSB or the other governmental bodies that the probable cause determination was wrong, failed to file a petition for reconsideration with the NTSB to correct its erroneous probable cause

(Cont'd)

are only relevant in so far as they relate to the accuracy or veracity of Allied's August 11, 1992 report to the NTSB, the same report that Shanks claims caused the NTSB to make its erroneous probable cause determination with respect to the Kenney airplane crash. In other words, Shanks asserts that if Allied had preserved evidence, performed additional tests, or informed the NTSB of the results of certain tests, the NTSB would not have relied on the allegedly false Allied report of August 11, 1992. As a result, the NTSB would not have issued its unfavorable probable cause determination regarding Shanks, and Shanks would not have been prosecuted by the other governmental bodies.

The "essence" of Shanks' negligence claim "is that he suffered injury as a result of the communication of allegedly false statements made during a [quasi-judicial] proceeding." *Laub*, 979 S.W.2d at 692. Shanks' complaints of negligence in this regard merely demonstrate that Allied's August 11, 1992 report to the NTSB was incorrect, and its complaint is essentially a claim that Allied was negligent in issuing its report and in not correcting its error. Another indication that Shanks' negligence claim is merely a restatement of his defamation claim is that the damages sought by Shanks' include defamation-type damages such as loss of reputation

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(Cont'd)
determination, and failed to join Shanks in his petition for reconsideration with the NTSB. (Second Amended Complaint, ¶ 26.1-7, 26.11, 26.17-18). All of these allegations are relevant only because of their potential impact upon Allied's initial conclusion and communication to the NTSB that poor aircraft maintenance was the cause of the Kenney airplane crash. In essence, they all concern Allied's conduct in assisting the NTSB with its investigation.

and earnings, as well as damages for the legal costs of defending himself. *Cf. Bird*, 868 S.W.2d at 772 ("The communication . . . is privileged . . . where the . . . damages are basically defamation damages.")

Shanks argues that absolute immunity does not attach to any dealings with the NTSB that occurred after August 11, 1992, the date of Allied's report to the NTSB presenting its findings regarding the Kenney airplane crash. Shanks, however, does not address the rule set forth in *Bird*, nor does he try to distinguish that case. Furthermore, the Court disagrees with Shanks' assertion that immunity does not cover any Allied statements or omissions occurring after August 11, 1992; the immunity extends to all statements made during the NTSB proceedings. Likewise, since motivation is irrelevant when absolute immunity applies, *see Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767-68 (Tex. 1987), the privilege extends to a failure to correct such statements. For the reasons stated above, the allegedly negligent conduct during the investigation that led Allied to reach its conclusion and communicate the damaging conclusion to the NTSB is privileged, as is its alleged failure to correct its erroneous conclusion.

MALICIOUS PROSECUTION

The Court believes an umbrella of immunity shields Allied from liability for its allegedly negligent conduct because the statements or omissions are only actionable to the extent they reflect upon Allied's initial communications with the NTSB; however, as an alternative basis for its holding, the Court concludes that Shanks' negligence claim

fails as a matter of law because in actuality it is a claim for malicious prosecution, albeit an unsuccessful one. "When a communication of an alleged wrongful act is made to an official authorized to protect the public from such act, that communication is entitled to only a qualified privilege."[3] *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex.App. – San Antonio 1997, *n.w.h.*).[4]

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3. In *Hurlbut*, 749 S.W.2d at 767-68, the Texas Supreme Court discussed the difference between an absolute and conditional privilege. An absolute privilege, which is essentially immunity from suit protecting the actor regardless of the actor's motivation, protects Allied's communications with the NTSB. *See Shanks*, 169 F.3d at 995. As already discussed, all of Shanks' bases for his negligence claim are covered by this absolute immunity because they are inextricably intertwined with Allied's erroneous communication to the NTSB. But were Allied's statements or failures to correct such statements not protected by an absolute privilege, they would nonetheless be protected by a conditional privilege. A conditional privilege, carved out to encourage the open exchange of information, applies depending upon the context in which the individual acts. *See Hurlbut*, 749 S.W.2d at 768. It is a privilege that applies unless the actor knows that his communication is false. *See id.*. Since a malicious prosecution case requires a showing of malice, statements made to law enforcement personnel regarding criminal behavior are in effect conditionally privileged. *See id.*

4. In *Thomas*, the court recognized that while a statement to law enforcement personnel is only conditionally privileged, should that statement relate to a judicial proceeding for which there is an absolute privilege, the statement to the law enforcement personnel is absolutely privileged. Specifically, the court stated,

> Whether an alleged defamatory matter is related to a proposed or existing judicial proceeding is a question of

(Cont'd)

Appendix B

Shanks' negligence claim is merely a malicious prosecution claim in disguise. Shanks claims that he suffered damages because Allied negligently failed to discover and communicate exculpatory information to governmental authorities, a failure which eventually led to his prosecution. Shanks alleges that Allied's "negligent, intentional and reckless acts and omissions . . . were a 'but for' or were a 'substantial factor in' proximately causing [his] damages." (Second Amended Complaint, ¶ 27). Allied contends that

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(Cont'd)

> law to be determined by the court. All doubt should be resolved in favor of the communication's relation to the proceeding. In this case, the trial court determined that the publication of appellee's letter to Deputy Fisher related to a judicial proceeding and was, therefore, absolutely privileged. We agree. . . . [T]he fact that appellee's letter was published to a law enforcement official has no bearing upon the privilege under the facts of this case. Appellee sent the letter in connection with and in contemplation of judicial proceedings. Even statements aimed at parties not involved in the proceeding are absolutely privileged if they bear some relation to a judicial proceeding. As such, the communication was privileged.

Thomas, 940 S.W.2d at 343-44 (citations omitted). The same situation exists in this case. Allied made statements to the NTSB that were absolutely privileged, although they were in error. It failed to correct its statements and inform law enforcement personnel that it was in error. As a result, Shanks was prosecuted and incurred damages. In essence, this is a malicious prosecution claim; however, the fact that it is a malicious prosecution claim does not alter the fact that the claim arises from the communications with the NTSB, communications that were absolutely privileged.

while Shanks labels this as negligence, "the gravamen of the complaint is that defendants improperly procured the criminal and civil prosecutions of Shanks and Fliteline Maintenance." (Motion for Summary Judgment, p. 9).

The Court agrees with Allied. The gist of Shanks complaint is that he was prosecuted criminally and civilly as a result of Allied's actions, or more appropriately, inaction.[5] Shanks seeks damages arising from the criminal and civil proceedings against him, including attorney fees and legal costs incurred as a result of those proceedings. The letter from Shanks' criminal defense attorney, Stephen Morris, relied upon by Shanks in his response to summary judgment, sums up Shanks' theory of the case.

> The criminal investigation that resulted in the criminal indictment against Eugene E. Shanks, Sr. was initiated as a result of the erroneous NTSB Probable Cause Statement, the joint investigative effort of Garrett [Allied] personnel, agents of the Federal Aviation Agency and agents of the Department of Transportation Inspector General's Office. The United States Attorney's Office and the agents of the Department of Transportation

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5. The fact that Shanks' amended complaint alleges omissions as opposed to affirmative misrepresentations to the governmental bodies by Allied does not change the analysis; the omissions are only relevant in so far as they amount to a failure to correct a prior affirmative representation. *Cf. Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 290, 294 (Tex. 1994) (recognizing that a failure to make a full and fair disclosure to law enforcement could provide a basis for a malicious prosecution claim).

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> Inspector General's Office initially relied upon the technical expertise of Garrett personnel in pursuing the Government's criminal investigation of Eugene E. Shanks Sr. . . . After attorneys representing the Government independently investigated the assertions alleged as the cause of the crash in the NTSB Probable Cause Statement, they concluded the information the Government relied on in seeking the Air Piracy count of the indictment against Mr. Shanks was erroneous.

(Plaintiff's Exhibit A, Letter of Stephen Morris to Plaintiff's Counsel dated June 29, 1997). Shanks tries to disguise his allegation as a negligence claim, but it is obvious that his real contention is that Allied's conduct during the investigation of the Kenney airplane crash and its conclusions eventually procured Shanks' prosecution.

The Texas courts have construed such negligence claims as malicious prosecution claims. *See Smith v. Sneed*, 938 S.W.2d 181, 183 (Tex.App. – Austin 1997, *no writ*); *ITT Consumer Financial Corp. v. Tovar*, 932 S.W.2d 147, 155-56 (Tex.App. – El Paso 1996, *writ denied*); *Wal-Mart Stores, Inc. v. Medina*, 814 S.W.2d 71, 74 (Tex.App. – Corpus Christi 1991, *writ denied*); *Armedariz v. Bill Sears Supermarket NO. 1*, 562 S.W.2d 529, 531 (Tex.App. – El Paso 1978, *writ ref'd n.r.e.*); *see also Campbell v. City of San Antonio*, 43 F.3d 973, 981 (5th Cir. 1995); *Lewis v. Continental Airlines, Inc.*, 80 F.Supp.2d 686, 697 (S.D.Tex. 1999). In *Smith*, the court stated, "[w]here an individual is implicated in a crime, subsequently exonerated, and then brings a claim for damages caused by the disclosure of information to the police and

the criminal prosecution, such a complaint is in essence a claim for malicious prosecution." *Smith*, 938 S.W.2d at 183. The court then went on to conclude, "[w]e therefore decline to hold that a duty exists outside the torts of malicious prosecution and defamation not to falsely accuse someone of criminal wrongdoing." *Smith*, 938 S.W.2d at 185; *see also Lewis*, 80 F.Supp.2d at 698.

Shanks argues that the policy rationale behind malicious prosecution is not present in this case. The Court disagrees. The elements of a malicious prosecution claim are strictly interpreted to preserve "the delicate balance between protecting against wrongful prosecution and encouraging reporting of criminal conduct." *Browning-Ferris Indus., Inc.*, 881 S.W.2d at 291. The courts require that the plaintiff prove a malicious intent in establishing its claim because a negligence standard of liability would not sufficiently protect those who report crimes; the strong public policy in favor of exposing criminal behavior necessitates that "a person wrongfully accused of a crime must bear a risk of being subjected to prosecution." *Smith*, 938 S.W.2d at 184.

The same interests are present in this case. Our society has an interest in safe aircraft, and invites private participants into the investigatory process to assist the government in determining the cause of accidents. Recognizing this interest, the Fifth Circuit has already concluded that absolute immunity attaches to Allied's communications with the NTSB during the investigation. It would defeat the purpose of absolute immunity should Allied nevertheless be liable for its allegedly negligent communications with the NTSB because some other governmental body chose to rely upon it in prosecuting Shanks.

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Having concluded that Shanks' negligence claim is merely a malicious prosecution claim in disguise, the Court must address whether the elements of malicious prosecution have been satisfied. To establish a claim for malicious prosecution, the plaintiff must prove: "(1) commencement of a criminal prosecution; (2) with malice; (3) without probable cause; (4) the prosecution ended in acquittal; and (5) damages." *Smith*, 938 S.W.2d at 183; *see also Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996) (discussing the elements of a claim for malicious prosecution of a civil proceeding, which are similar to the elements of a criminal malicious prosecution claim).

An essential element of a malicious prosecution claim is that the action terminate in the accused's favor; however, "[d]ismissal of a criminal prosecution brought about by the procurement or compromise of the person therein accused is not such an end of the prosecution as will warrant an action for damages for malicious prosecution." *Pete v. Metcalfe*, 8 F.3d 214, 219, n.9 (5th Cir. 1993) (holding that an end to the proceedings as a result of a plea of *nolo contendre* did not terminate in the accused's favor) (quoting *Ellis v. Sinton Savings Ass'n*, 455 S.W.2d 834, 842 (Tex.App. – Corpus Christi 1970, *writ ref'd n.r.e.*)); *see James*, 637 S.W.2d at 919 (addressing a claim for malicious prosecution of a civil proceeding). That is, an end to the prosecution as a result of a plea bargain would not constitute a termination in Shanks' favor. *See Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994) ("Entering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant for purposes of bringing a malicious prosecution claim."); *Ellis*, 455 S.W.2d at 842; *Mrkva v. Slovak*, 107 S.W.2d 923, 924

(Tex.App. – Waco 1937, *n.w.h.*) (holding that a guilty plea is not a termination favorable to the accused for purposes of a malicious prosecution claim).

In this case, Shanks pleaded guilty to two counts of the federal indictment, and the United States Attorney dismissed the other six counts. In the FAA proceeding, Shanks reached an agreement with the FAA after he appealed the decision to the NTSB. Pursuant to that agreement, Shanks retained his pilot's license, but his airman mechanic certificate was revoked. As discussed above, neither of these proceeding terminated in Shanks' favor. Accordingly, his negligence/ malicious prosecution claim fails as a matter of law.

CONCLUSION

The Court concludes that Shanks' negligence claim is in actuality a creative attempt to assert a claim for malicious prosecution. It is barred by absolute immunity because it addresses conduct or communications related to statements made during the NTSB investigation. To the extent Shanks' claim is not barred by absolute immunity, he fails as a matter of law to create an issue of fact with respect to all the requisite elements of such a claim. The only claim remaining for trial is Shanks' defamation claim against Sandy Meour.

It is so ORDERED. The clerk shall enter this order and provide a true copy to each party.

Signed this 3rd day of August, 2000.

s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 18, 2000 AND ENTERED AUGUST 21, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1906

EUGENE E. SHANKS, SR. d/b/a FLITELINE MAINTENANCE,

Plaintiff,

v.

ALLIEDSIGNAL, INC. d/b/a GARRETT ENGINE DIVISION, *et al.*,

Defendants.

FINAL JUDGMENT

On August 18, 2000, Plaintiffs filed a "Notice of Nonsuit for Defamation Cause of Action Only." The Court construes Plaintiffs' "Notice of Nonsuit" to be a voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(ii).[1] Accordingly, Plaintiffs'

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1. Although all parties have not signed the "Notice of Nonsuit" as required by Fed.R.Civ.P. 41(a)(1)(ii), Plaintiffs' counsel and Defendants' counsel have orally represented to the Court that Defendants are unopposed.

defamation claim against Defendant Sandy Moeur is DISMISSED.

Since the Court granted Defendants' motion for partial summary judgment disposing of all other causes of action in this case, the Court concludes that final judgment should be entered.[2]

It is so ORDERED

Signed this 18th day of August, 2000.

s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

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2. In light of this ruling, Defendants' motion to strike (Dkt. #92) and objections to Plaintiffs' exhibits (Dkt. #93) are MOOT.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MARCH 30, 1999

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 97-20683

EUGENE E. SHANKS, SR., doing business as Fliteline Maintenance Incorporated, doing business as Fliteline Maintenance; FARM AND RANCH AERIAL APPLICATOR SERVICES INCORPORATED; GULF COAST AG INCORPORATED,

Plaintiffs-Appellees,

versus

ALLIEDSIGNAL, INC., doing business as Garrett Engine Division; ET AL.,

Defendants,

ALLIEDSIGNAL, INC, doing business as Garrett Engine Division; PETER BAKER, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc; SANDY MEOUR, doing business as Garrett Engine Division, doing business as Alliedsignal, Inc.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Appendix D

Before POLITZ, EMILIO M. GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This case begins with the crash of an agricultural aircraft in rural Louisiana. The aircraft had been manufactured by Defendants AlliedSignal, Inc., Peter Baker, and Sandy Meour (collectively "Allied"). It had been maintained by Plaintiffs Eugene Shanks, Farm and Ranch Aerial Applicator Services, and Gulf Coast AG, Inc. (collectively "Shanks"). Pursuant to 49 U.S.C. § 1132, the National Transportation Safety Board ("NTSB") conducted an official investigation to determine the probable cause of the crash. The NTSB designated Allied as a party to the investigation under 49 C.F.R. § 831.11. As a party, Allied participated in the NTSB investigation, which included a tear-down of the aircraft's engine at Allied's facility in Houston, Texas.

Following its investigation, the NTSB issued a "Brief of Accident," as required by federal law.[1] Although the report did not mention Shanks explicitly, it concluded that the probable cause of the accident was the fact that "[t]he airplane was improperly maintained."[2] Shanks alleges that Allied

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1. The NTSB is obliged to "report on the facts and circumstances of each accident investigated by it." 49 U.S.C. § 1131(e). Its conclusions must be "issued in the form of a report or 'brief' of the incident or accident." 49 C.F.R. § 831.4.

2. The section of the report entitled "Probable Cause" read:

> The National Transportation Safety Board determines that the Probable Cause(s) of this accident was: A loss

(Cont'd)

conspired to manipulate the NTSB investigation and contributed to an accident report that was false and misleading.[3] He also claims that Allied owed him a duty to rectify errors in the NTSB's report.[4] According to Shanks, the NTSB's false accident report led to his indictment on eight federal felony counts. Shanks also claims that the Federal Aviation Administration, prompted by the NTSB report, forced him to agree not to reapply for an airman mechanic's license for one year.

(Cont'd)

of control during a propeller underspeed condition which resulted in a stall. The underspeed condition was caused by a speeded spring failure as a result of a binding bogus propeller pitch control cam. The airplane was improperly maintained.

3. After filing this lawsuit, Shanks petitioned the NTSB for reconsideration. In response, the NTSB issued a revised accident report, which found that the probable cause of the accident was pilot error. The revised report concluded that the probable cause of the accident was "the pilot's failure to maintain adequate airspeed, resulting in an inadvertent stall."

4. In addition, Shanks contends that Defendant Sandy Meour made a defamatory statement many months after the NTSB investigation. His complaint also alleges that Allied's conduct "is continuing in nature and that such acts are not complete in themselves." On appeal, Shanks argues that this language refers to acts by Allied outside the NTSB investigation. As explained below, claims based on conduct other than communications made during the NTSB investigation are not properly before us on appeal. *See infra* at n.6.

Appendix D

Shanks asserts numerous state law causes of action arising from Allied's conduct. His complaint alleges "defamation, tortious interference with business relations, intentional infliction of mental distress, common law negligence, unfair trade practices, negligent infliction of mental distress, intentional infliction of emotional distress, fraud and civil conspiracy." Allied filed a motion for summary judgment on the ground that it was immune from suit for statements made during the NTSB investigation. It argued that Texas law provides absolute immunity for any communications made in connection with judicial, quasi-judicial, or legislative proceedings. The district court denied Allied's motion, finding that the NTSB investigation was not a judicial, quasi-judicial, or legislative proceeding, nor were statements made during the investigation sufficiently connected to any other judicial, quasi-judicial, or legislative proceedings. Allied now appeals the district court's order denying its motion for summary judgment. We vacate that order and remand for further proceedings.

I

Shanks argues that we lack jurisdiction over this appeal because the order from which Allied appeals is not a final decision. Under 28 U.S.C. § 1291, we have jurisdiction to hear "appeals from all final decisions of the district courts of the United States." We read this language to encompass interlocutory appeals "from a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.' " *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S. Ct. 1203, 1208, 131 L. Ed. 2d 60 (1995). This doctrine, known as the collateral order doctrine, applies

only to those decisions "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.*

In *Quirk v. Mustang Engineering, Inc.*, 143 F.3d 973 (5th Cir. 1998), we asserted jurisdiction over an immunity claim almost identical to the one before us today. The defendant in *Quirk* moved for summary judgment on the ground that he was absolutely immune from suit for statements made during a quasi-judicial proceeding. The district court denied his motion, and the defendant appealed. We heard the appeal, finding that "[w]e have jurisdiction over interlocutory appeals denying summary judgment based on absolute immunity." *Id.* at 975.

The *Quirk* panel did not, however, specifically address whether an order denying such an immunity is properly deemed "final" under § 1291 and the collateral order doctrine. Nonetheless, an independent application of our precedent in that area compels the same result. "[O]rders denying certain immunities are strong candidates for prompt appeal under § 1291." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 871, 114 S. Ct. 1992, 1998, 128 L. Ed. 2d 842 (1994). An immunity from suit is not only a means of prevailing on the merits, but an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). This entitlement is "effectively lost if a case is erroneously permitted to go to trial." *Swint*, 514 U.S. at 42, 115 S. Ct. at 1208 (emphasis omitted). In the parlance of the collateral order doctrine, a claim of immunity from suit

is "effectively unreviewable" once the defendant is forced to go to trial, because he or she is permanently deprived of the right to avoid the burdens of litigation. *Id.* For this reason, we have heard appeals from interlocutory orders denying a defendant's assertion of immunity from suit. *See, e.g.*, *Cantu v. Rocha*, 77 F.3d 795, 804 (5th Cir. 1996); *Sorey v. Kellett*, 849 F.2d 960, 962 (5th Cir. 1988); *Williams v. Collins*, 728 F.2d 721, 726 (5th Cir. 1984).

We must, however, "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 873, 114 S. Ct. at 1999. As the Supreme Court has acknowledged, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.' " *Id.* at 873, 114 S. Ct. at 1998. Consequently, when we assess whether interlocutory review is appropriate, "[t]he critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524, 108 S. Ct. 1945, 1950, 100 L. Ed. 2d 517 (1988). Thus our jurisdiction to review the order now appealed turns on whether Allied's claim of absolute immunity "provides a true immunity from suit and not a simple defense to liability." *Sorey*, 849 F.2d at 962; *see also Swint*, 514 U.S. at 43, 115 S. Ct. at 1208 (denying jurisdiction under the collateral order doctrine where defendant's claim was based on a "mere defense to liability" and not an "immunity from suit").[5]

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5. When the district court denies a defendant's immunity-based summary judgment motion because of disputed factual issues, we do not have appellate jurisdiction under 28 U.S.C. § 1291. *See Johnson*

(Cont'd)

Appendix D

Allied bases its immunity claim on the rule of Texas law that communications made during the course of judicial, quasi-judicial, or legislative proceedings are "absolutely privileged." *Reagan v. Guardian Life Ins.*, 166 S.W.2d 909, 912 (Tex. 1942). Although appellate jurisdiction under § 1291 is a matter of federal law, we look to state law to determine whether the basis of Allied's claim is properly characterized as an immunity from suit or merely a defense to liability. *See Tamez v. City of San Marcos*, 62 F.3d 123, 125 (5th Cir. 1995) (assessing whether a defendant may appeal an interlocutory order denying a motion for summary judgment based on state law qualified immunity). According to the Texas Supreme Court, the absolute privilege claimed by Allied "is more properly thought of as an immunity." *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). Communications subject to this privilege simply "cannot constitute the basis of a civil action." *Reagan*, 166 S.W.2d at 912. Where the privilege arises, "no action in damages . . . will lie." *Id.* One Texas court has held, in near perfect response to the jurisdictional inquiry now before us, that this "absolute privilege is not a defense. Rather, absolutely privileged communications are not actionable." *CEDA Corp. v. City of Houston*, 817 S.W.2d 846, 849 (Tex.App. – Houston [1st Dist.] 1991, writ denied) (citations omitted). Such communications are "absolutely immune from civil liability."

(Cont'd)
v. Jones, 515 U.S. 304, 313, 115 S. Ct. 2151, 2156, 132 L. Ed. 2d 238 (1995) (denying appellate jurisdiction because the district court found that genuine issues of fact precluded granting summary judgment for defendants based on qualified immunity); *Petta v. Rivera*, 143 F.3d 895, 898 (5th Cir. 1998) (same). In the present case, the district court denied Allied's motion as a matter of law.

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Attaya v. Shoukfeh, 962 S.W.2d 237, 240 (Tex. App. – Amarillo 1998, writ denied).

We are convinced that Texas law regards its privilege for communications made in the context of judicial, quasi-judicial, or legislative proceedings as a complete immunity from suit, not a mere defense to liability. To insist on a final judgment before reviewing a denial of that immunity could deprive Allied of its entitlement to avoid the burdens of trial. Allied may therefore appeal the district court's rejection of its immunity claim as a collateral order under 28 U.S.C. § 1291.

II

Allied contends that the district court erred in denying its motion for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). We review a district court's denial of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmovant. *See Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998). Where, as here, a defendant moves for summary judgment based on a defense for which he or she would have the burden at trial, he or she must "establish each element of that defense as a matter of law." *Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)).

Allied argues that it is absolutely immune under Texas law from any suit based on its communications with the

NTSB. It claims immunity on the grounds that (1) the NTSB investigation was a quasi-judicial proceeding, (2) communications made during the NTSB investigation were preliminary to other quasi-judicial or judicial proceedings, and (3) communications made to the NTSB were connected to legislative proceedings. Shanks responds that the immunities provided by Texas law do not apply to communications made during NTSB investigations. Shanks also argues that a party to an NTSB investigation is precluded from claiming immunity in connection with litigation arising from that investigation.[6]

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6. Shanks makes two additional arguments that are not properly before us. First, Shanks's brief devotes four sentences to the argument that federal law preempts the state law immunities on which Allied relies. This claim was raised for the first time on appeal, and we shall not address it. *See Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir. 1993) ("Typically, we will not consider on appeal matters not presented to the trial court.").

Second, Shanks contends that Allied committed actionable conduct outside the scope of the NTSB investigation, for which the immunity claimed by Allied would not apply. We decline to examine these claims, because the district court never addressed whether any actionable conduct took place outside of the NTSB investigation. "It is the general rule that a federal appellate court does not consider an issue not passed upon below." *Americans Disabled for Accessible Pub. Transp. v. Skinner*, 881 F.2d 1184, 1197 (3d Cir. 1989) (en banc); *see also Baker v. Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980) ("Generally this court will not reach the merits of an issue not considered by the district court."). More significantly, we lack jurisdiction over such claims, because there is no appealable order as to alleged conduct outside of the NTSB investigation. The decision now being appealed rejected Allied's argument "that its

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Appendix D

A

We first address whether a defendant is entitled to absolute immunity for communications made in connection with accident investigations by the NTSB. Where, as here, a federal court exercises jurisdiction over state law causes of action based on diversity of citizenship, *see* 28 U.S.C. § 1332, we must apply state substantive law. *See Rogers v. Corrosion Prods., Inc.*, 42 F.3d 292, 295 (5th Cir. 1995) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). To determine state substantive law, we look to final decisions of the state's highest court. *See Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992). "When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." *Id.*

Although the Texas Supreme Court has never specifically decided whether communications during NTSB investigations are immune from suit, it has provided strong guidance to predict how it would rule on this particular issue. The immunity asserted by Allied "attaches only to a limited

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communications with the NTSB in connection with the accident investigation" are immune from suit. As to any claims that are not based on "communications with the NTSB in connection with the accident investigation," there is no appealable order. Without an appealable order, we cannot exercise appellate jurisdiction. *See In re Grand Jury Proceedings*, 724 F.2d 1157, 1159 (5th Cir. 1984) (holding that an appealable order is "a prerequisite for an appeal to this court").

and select number of situations which involve the administration of the functions of the branches of government, such as statements made during legislative and judicial proceedings." *Hurlbut*, 749 S.W.2d at 768. This absolute immunity applies to quasi-judicial proceedings as well. *See Reagan v. Guardian Life Ins.*, 166 S.W.2d 909, 912 (Tex. 1942); *see also Matta v. May*, 118 F.3d 410, 415 (5th Cir. 1997) (holding that absolute immunity under Texas law "applies to quasi-judicial proceedings before governmental agencies"). In *Reagan v. Guardian Life Insurance Co.*, the Texas Supreme Court noted that an agency proceeding may be deemed quasi-judicial for immunity purposes where a statute confers upon the agency "the power to conduct investigations and hearings." *Reagan*, 166 S.W.2d at 913 (citing *Aransas Harbor Terminal Ry. Co. v. Taber*, 235 S.W. 841 (Tex. 1921)). During accident investigations, the NTSB unquestionably possesses these powers. *See* 49 U.S.C. § 1113(a) (power to conduct hearings); 49 U.S.C. § 1131(a)(1) (power to conduct investigations).

These cases provide solid grounds to predict that the Texas high court would find that NTSB accident investigations are quasi-judicial proceedings, from which it would follow that any communications made during such investigations are absolutely immune from suit. The Texas courts of appeal provide further support.[7] Texas courts have recognized six factors that are relevant to whether proceedings are quasi-judicial for purposes of absolute immunity:

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7. When making an "*Erie*-guess" as to how a state's high court would decide an issue, it is proper to look to the decisions of lower state courts. *See Hill v. London, Stetelman, & Kirkwood, Inc.*, 906 F.2d 204, 207 (5th Cir. 1990).

(1) the power to exercise judgment and discretion;

(2) the power to hear and determine or to ascertain facts and decide;

(3) the power to make binding orders and judgments;

(4) the power to affect the personal or property rights of private persons;

(5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and

(6) the power to enforce decisions or impose penalties.

Village of Bayou Vista v. Glaskox, 899 S.W.2d 826, 829 (Tex. App. – Houston [14th Dist.] 1995, no writ) (quoting *Parker v. Holbrook*, 647 S.W.2d 692, 695 (Tex. App. – Houston [1st Dist.] 1982, writ ref'd n.r.e.)); *see also Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 144 (Tex. App. – Corpus Christi 1986, writ denied). NTSB investigations satisfy at least the first, second, and fifth of these criteria. The NTSB may ascertain facts and decide. *See* 49 U.S.C. § 1131(a) (empowering the NTSB to "establish the facts, circumstances, and cause or probable cause" of aircraft accidents). This power necessarily implies a power to exercise judgment and discretion. The NTSB may also "conduct hearings . . ., administer oaths, and require, by subpoena or otherwise, necessary witnesses and evidence." 49 U.S.C. § 1113(a)(1).

Admittedly, NTSB investigations lack other indicia of quasi-judicial proceedings. Such investigations, for example, "are not conducted for the purpose of determining the rights or liabilities of any person." 49 C.F.R. § 831.4. However, a proceeding need not meet all of the above criteria to be considered quasi-judicial. *See Parker*, 647 S.W.2d at 695. As discussed above, the leading Texas Supreme Court case on quasi-judicial proceedings noted that an agency proceeding may be deemed quasi-judicial simply where a statute confers upon the agency "the power to conduct investigations and hearings." *Reagan*, 166 S.W.2d at 913. Thus, although the factors are surely helpful guidelines, courts have not applied them formulaically, nor have they required that a threshold number of these criteria be satisfied.

Taking a more comprehensive look at the case law, we find only two situations in which Texas courts have found that communications to government agencies are not entitled to absolute immunity. The first involves unsolicited communications to law enforcement officials. In *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d at 768, the Texas Supreme Court found that initial communications "to a public officer . . . who is authorized or privileged to take action" are subject only to a qualified privilege, not the absolute immunity claimed by Allied. *See also Zarate v. Cortinas*, 553 S.W.2d 652, 655 (Tex. Civ. App. – Corpus Christi 1977, no writ). In such cases, however, the challenged statements were made in advance of any formal proceeding or investigation. *See Hurlbut*, 749 S.W.2d at 764; *Zarate*, 553 S.W.2d at 654. Texas courts have clarified that when communications relate to an ongoing proceeding, absolute immunity still applies. *See Thomas v. Bracey*, 940 S.W.2d

340, 343 (Tex.App. – San Antonio 1997, no writ). The communications for which Allied claims immunity were made in connection with an ongoing NTSB investigation.

Texas courts have also denied absolute immunity where the challenged communications are made to agencies that issue merely recommendations or preliminary findings. One case concerned a regional council of county governments charged with making recommendations to federal agencies on requests for health services grants. *See Parker*, 647 S.W.2d at 696. The court of appeals concluded that the council was not quasi-judicial, because its decisions were "preliminary in nature," and because the council was not "the final arbiter." *Id.* It is true that during an accident investigation, the NTSB is not the "final arbiter" of any entity's legal rights. However, its findings are more than mere recommendations. The NTSB must "establish the facts, circumstances, and cause or probable cause" of aircraft accidents. 49 U.S.C. § 1131(a)(1). Once it does so, its findings need not be approved or ratified by another agency. The NTSB has the final word.

Furthermore, it would be nonsensical to characterize the NTSB's investigation as "preliminary" to litigation over an aircraft accident, because by federal statute, no part of an NTSB report may be "used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 1154(b). Although the NTSB's conclusions are not relevant to any party's legal rights, Congress has deemed the NTSB's findings sufficiently important that its investigations have "priority over any investigation by another department, agency, or instrumentality of the United States Government." 49 U.S.C. § 1131(a)(2). Therefore, we find inapposite Texas

cases suggesting that absolute immunity does not apply to government agencies whose conclusions are merely preliminary.

For these reasons, we hold that an NTSB accident investigation would qualify as a quasi-judicial proceeding under Texas law. Thus Texas law grants absolute immunity from suit for statements made during such investigations.[8]

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8. Absolute immunity unquestionably applies to Shanks's defamation claim. *See Reagan*, 166 S.W.2d at 912 ("An absolutely privileged communication is one for which . . . no remedy exists in a civil action for libel or slander."). However, Shanks pleads numerous causes of action in addition to defamation, including tortious interference with business relations, negligence, intentional infliction of emotional distress, and civil conspiracy. It is unclear whether, under Texas law, absolute immunity bars all causes of action arising from communications during a quasi-judicial proceeding.

The Texas Supreme Court has intimated that absolute immunity applies only to defamation actions. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994) (recognizing that in *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982), the high court "declined to expand the privilege beyond libel and slander"). It clarified, however, that where a cause of action is "virtually indistinguishable" from a defamation claim, and where the damages sought "are basically defamation damages," absolute immunity still applies. *See Bird*, 868 S.W.2d at 771-72. It noted that a plaintiff should not be able to circumvent the policy behind absolute immunity merely by pleading creatively. *See id.* at 772 (citing *Doe v. Blake*, 809 F. Supp. 1020, 1028 (D. Conn. 1992)). Thus the Texas Supreme Court applied absolute immunity to a negligence action based on statements during judicial proceedings. *See Bird*, 868 S.W.2d at 771-72.

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Appendix D

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Lower Texas courts have also struggled with whether absolute immunity applies to causes of action other than defamation. Some courts have addressed whether absolute immunity applies to particular non-defamation causes of action. *See Rose v. First Am. Title Ins. Co.*, 907 S.W.2d 639, 643 (Tex. App. – Corpus Christi 1995, no writ) (rejecting the argument that absolute immunity "applies only to causes of action for defamation and not to intentional infliction of emotional distress"); *K.B. v. N.B.*, 811 S.W.2d 634, 640 (Tex. App. – San Antonio 1991, writ denied) (applying absolute immunity where the theory of recovery is intentional infliction of emotional distress); *City of Brady v. Bennie*, 735 S.W.2d 275, 278-79 (Tex. App. – Eastland 1987, no writ) (finding that although absolute immunity would apply to libel or slander claims, only qualified immunity would apply to cause of action for tortious interference). Some courts have applied absolute immunity to different types of claims without limitation. *See Hernandez v. Hayes*, 931 S.W.2d 648, 654 (Tex. App. – San Antonio 1996, writ denied) ("Although the [immunity from suit for statements made during a quasi-judicial proceeding] arises as a defense to defamation, it must be applied to all of appellant's causes of action."). Other courts have inquired whether the "essence" of a plaintiff's alternate cause of action sounds in defamation. *See Laub v. Pesikoff*, 979 S.W.2d 686, 690-92 (Tex. App. – Houston [1st Dist.] 1998, writ denied) (applying absolute immunity to causes of action for intentional interference, civil conspiracy, intentional infliction of emotional distress, and negligence, where "the essence of each of these claims is that [the plaintiff] suffered injury as a result of false statements during a judicial proceeding"); *Bennett v. Computer Assocs. Int'l, Inc.*, 932 S.W.2d 197, 204 (Tex. App. – Amarillo 1996, writ denied) (declining to apply absolute immunity to claim for tortious interference where defendant "undertook purportedly tortious conduct involving other than disparaging or false words"); *Martinez v. Hardy*, 864 S.W.2d 767, 776 (Tex. App. – Houston [14th Dist.] 1993, no writ) (applying absolute immunity to tortious interference cause of action where "gravamen of [plaintiff's] tortious interference claim is the allegedly defamatory statements").

(Cont'd)

Appendix D

The district court erred in finding the NTSB investigation was not a quasi-judicial proceeding for purposes of Texas immunity law.

B

Shanks also argues that NTSB policy precludes Allied's immunity claim. Specifically, Shanks points out that parties to an accident investigation are required to sign a "Statement of Party Representatives" *See* 49 C.F.R. § 831.11(b). The statement provides, among other things: "By placing their signatures hereon all participants agree that they will neither assert nor permit to be asserted on their behalf, any privilege in litigation, with respect to information or documents obtained during the course of and as a result of participation in the NTSB investigation."

Shanks's argument fails for several reasons. First, Allied never signed the Statement of Party Representatives or any other document containing such language. In fact, the provision requiring parties to sign the Statement of Party Representatives was not added to the NTSB regulations until 1997, four years after the NTSB's initial investigation into

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Allied raises this issue cursorily, arguing in a footnote that although absolute immunity "was first developed in the context of defamation claims, . . . it is now clear that it applies to all theories of recovery based on the immunized communications." The district court never addressed this question, however, and we decline to examine it for the first time on appeal. We leave it for the district court to determine on remand whether absolute immunity applies to Shanks's other causes of action.

this matter had concluded. *See* 62 Fed. Reg. 3806, 3808 (1997) (adding current language in 49 C.F.R. § 831.11(b)). Second, even if the statement binds Allied nonetheless, its language does not cover the kind of substantive immunity asserted by Allied in this case. Its terms merely prohibit parties from asserting a privilege "with respect to information or documents obtained" during NTSB investigations. Thus the statement focuses on evidentiary matters, that is, the disclosure of "information or documents." The Tenth Circuit has described it as a "*discovery* waiver[ ]," by which parties "g[i]ve up *discovery* privileges potentially assertable in a tort liability case." *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 647 (10th Cir. 1990) (emphasis added). The NTSB has characterized its policy as "requir[ing] parties to waive any objection to civil discovery about their investigatory role in the event litigation commences." *Id.* at 637.

For these reasons, we find that the NTSB's Statement of Party Representatives applies only to evidentiary privileges from the disclosure of information, not to substantive immunities from suit. It therefore does not prevent Allied from claiming that its conduct during the NTSB investigation is immune from suit under Texas law. Nor has Shanks identified any NTSB policy independent of the Statement of Party Representatives that would preclude Allied from asserting immunity.

III

Accordingly, we VACATE the district court's order denying Allied's motion for summary judgment and REMAND for further proceedings not inconsistent with this opinion.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 1, 1997 AND ENTERED AUGUST 6, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1906

EUGENE E. SHANKS, SR. d/b/a FLITELINE MAINTENANCE,

Plaintiff,

v.

ALLIEDSIGNAL, INC. d/b/a GARRETT ENGINE DIVISION, *ET AL.*,

Defendants.

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion for Judgment On the Pleadings or for Summary Judgment (Docket #23). After considering the motion, response, reply, and the applicable law, the Court has decided that the motion should be DENIED.

Appendix E

I. BACKGROUND

On May 14, 1992, an agriculture aircraft crashed in rural Louisiana, killing the pilot. The aircraft had been manufactured by Defendant Garrett Engine Division of AlliedSignal, Inc. ("Allied")[1] and maintained by Plaintiff Eugene E. Shanks, Sr. ("Shanks"), doing business as Fliteline Maintenance. During 1992 and 1993, the National Transportation Safety Board ("NTSB") investigated the accident with the participation and assistance of Allied and issued a probable cause statement concluding that the crash was caused by improper maintenance of the aircraft. Thereafter, Shanks was indicted for falsifying maintenance records and had his certification revoked by the Federal Aviation Administration ("FAA"). Over three years later, the NTSB revised its statement and found that the accident was caused by pilot error, not improper maintenance.

Shanks filed this lawsuit on June 6, 1996 against Allied and various agents of Allied based on their participation in the NTSB investigation. Shanks asserts causes of action against the defendants for defamation, tortious interference with business relations, negligence, unfair trade practices, intentional and negligent infliction of emotional distress, fraud, and civil conspiracy. Allied argues in its motion for summary judgment that all of Shanks' causes of action fail as a matter of law because the communications in question were absolutely privileged. Shanks also appears to claim that he was defamed by Defendant Sandy Meour, who allegedly announced on February 2, 1994 that an FAA Airworthiness

1. References to "Allied" herein refer to the defendants collectively.

Directive was imminent which could require a conformity check on any engine ever worked on by Shanks. Allied and Meour argue that this claim fails as a matter of law because it was true.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). If the movant is a defendant, it may rely on the lack of evidence to support an essential element of the plaintiff's case. *Id.* at 323-24, 106 S. Ct. at 2553; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Once the movant meets this initial showing, the burden shifts to the nonmovant to set forth facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Appendix E

III. ANALYSIS

A. Absolute immunity

Allied argues that its communications with the NTSB in connection with the accident investigation are absolutely privileged from suit because they were made in the course of a quasi-judicial proceeding. Under Texas law, communications made in the due course of a judicial proceeding enjoy absolute immunity from suit for defamation, regardless of their falsity or malice. *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982). This privilege extends to proceedings before executive officers, boards, and commissioners which exercise quasi-judicial powers. *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942); *Rose v. First American Title Ins. Co.*, 907 S.W.2d 639, 641-42 (Tex. App. – Corpus Christi 1995, no writ). According to Allied, the NTSB's field investigation of the airplane crash was a quasi-judicial proceeding to which absolute privilege applies. This Court cannot agree.

The NTSB is responsible for the organization, conduct, and control of accident investigations involving civil aircraft in the United States. 49 C.F.R. § 831.2(a)(1) (1993).[2] Such investigations are conducted

> in order to determine the facts, conditions, and circumstances relating to each accident or incident and the probable cause thereof and to ascertain

2. All cites to the Code of Federal Regulations refer to the 1993 version thereof, since that is when the investigation in question took place.

> measures which will best tend to prevent similar accidents or incidents in the future. The investigation includes the field investigation, report preparation, and, where ordered, the public hearing. Accident investigations are fact-finding proceedings with *no formal issues* and *no adverse parties* and are not subject to the provisions of the Administrative Procedure Act (Pub. L. 89-554, 80 Stat. 384 (5 U.S.C. 554 et seq.)). *Such investigations are not conducted for the purpose of determining the rights or liabilities of any person.*

49 C.F.R. § 831.4 (emphasis added). That is, the purpose of an NTSB investigation is to determine what happened and how to prevent it from happening again, not to render a judgment with respect to any particular party. The outcome of an NTSB investigation results in no binding judgment, no penalties imposed, and does not directly affect the rights or privileges of any party. It is purely administrative. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 275, 113 S. Ct. 2606, 2616-17, 125 L. Ed. 2d 207 (1993) (holding that preliminary investigation of crime is entirely administrative, even though it may ultimately result in a criminal indictment). In this respect it is fundamentally different from the cases cited by Allied which found absolute immunity. For example, in *Village of Bayou Vista v. Glaskox*, 899 S.W.2d 826 (Tex. App. – Houston [14th Dist.] 1995, *no writ*), the communication in question took place during a Board of Aldermen meeting, by a member of the board, while the board was considering whether to reinstate the plaintiff as a police officer. And in *Putter v. Anderson*, 601 S.W.2d 73 (Tex. Civ. App. – Dallas

1980, writ ref'd n.r.e.), the communication in question was a letter to the police internal affairs division, which had the duty to determine whether the complaint was justified and take appropriate action against the plaintiff. Both of these cases involved proceedings to determine a course of action affecting particular parties, whereas the NTSB investigation had "no formal issues and no adverse parties."

Allied argues, however, that even if no judicial proceeding is pending, the accident investigation is a preliminary aspect of a judicial proceeding to which the absolute privilege applies. Allied correctly notes that the absolute privilege encompasses communications in contemplation of and preliminary to judicial proceedings. *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App. – San Antonio 1997, no writ). However, this rule applies "only when the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." RESTATEMENT (SECOND) OF TORTS § 588 cmt. e (1977).[3] As discussed *supra*, an NTSB investigation is simply an attempt to determine what happened and how to prevent it from happening again. The fact that Shanks was later indicted and had his FAA certification revoked does not retroactively make it preliminary to a judicial proceeding.

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3. The Texas Supreme Court generally follows the provisions of the RESTATEMENT (SECOND) OF TORTS on issues of privilege from liability for defamatory statements. *See Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987).

Buckley, 509 U.S. at 275-76, 113 S. Ct. at 2606. Thus, the NTSB investigation cannot be characterized as a judicial or quasi-judicial proceeding.

Allied also argues that the NTSB is, essentially, an investigative arm of Congress, and that its statements to the NTSB in the context of the crash investigation were communications preliminary to a legislative proceeding, which enjoy absolute immunity. Allied relies on *Webster v. Sun Co., Inc.*, 561 F. Supp. 1184 (D.D.C. 1983) for this proposition. In Webster, the court held that communications to the Congressional Research Service ("CRS") were absolutely privileged because they were preliminary to a legislative proceeding. *Id.* at 1189 (relying on RESTATEMENT (SECOND) OF TORTS § 590A). On appeal, the D.C. Circuit held that unsolicited statements to the CRS could be absolutely privileged, but only if (1) they would not have been made but for the alleged defamer's intent of informing Congress, and (2) they have some relevance to the legislative issue they were meant to address. *Webster v. Sun Co., Inc.*, 731 F.2d 1, 5 (D.C. Cir. 1984) (vacating and remanding for further findings). The Court is not convinced that Allied's communications to the NTSB in the context of a particular investigation are analogous to the communications in *Webster* to the CRS, which has the express mission of informing Congress on legislative matters. *Webster*, 561 F. Supp. at 1188. However, even assuming they are, Allied has not shown that it would not have made the alleged communications but for its intent to inform Congress, or that its comments were pertinent to any particular legislative issue. Therefore, Allied has not shown itself to be entitled to judgment as a matter of law.

Appendix E

B. Meour's statement

Allied also seeks summary judgment that it cannot be liable for the alleged statement by Defendant Sandy Meour on February 2, 1994 that "an FAA Airworthiness Directive is imminent which could require a conformity check on any engine ever worked on by Mr. Shanks." According to Allied, the statement was true or substantially true. Approximately six months after the alleged defamatory statement, the FAA published in the Federal Register a proposed rulemaking requiring a conformity check on all Garrett engines worked on by Shanks. Then, approximately a year thereafter, the FAA issued Airworthiness Directive 95-16-08, which in fact required a conformity check on Garrett engines worked on by Shanks.

Truth and substantial truth are absolute defenses to defamation. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990). The test for substantial truth is whether the alleged statement was more damaging in the mind of the average listener than a completely truthful statement would have been. *McIlvain*, 794 S.W.2d at 16. The Court finds two problems with Allied's argument. First, although an Airworthiness Directive eventually issued regarding Shanks, the alleged statement said it was "imminent," when in truth it did not issue until approximately 18 months later. Second, the alleged statement said the directive would apply to "any engine ever worked on by Mr. Shanks," when in truth the directive only applied to Garrett engines. The Court is unable to determine whether any real difference would have been perceived in the mind of the average listener between

"imminent" and 18 months, or "any engine" and Garrett engines without more evidence regarding the nature of Shanks' business and his customers. Therefore, fact issues preclude the entry of summary judgment in favor of Allied.

IV. CONCLUSION

The Court finds that Allied's communications with the NTSB during the accident investigation underlying this case were not statements made in the course of a judicial proceeding, nor were they statements preliminary to a legislative proceeding that would entitle them to absolute privilege. The Court also finds that fact issues exist on Allied's affirmative defense of truth with respect to the comment made by Sandy Meour. Therefore, Allied is not entitled to judgment as a matter of law and it is

ORDERED that Defendants' Motion for Judgment on the Pleadings or for Summary Judgment is DENIED.

Signed this 1st day of August, 1997.

s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX F — 49 C.F.R. 831.4

49 CFR 831.4

§ 831.4 Nature of Investigation.

Accident and incident investigations are conducted by the Board to determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents or incidents in the future. The investigation includes the field investigation (on-scene at the accident, testing, teardown, etc.), report preparation, and, where ordered, a public hearing. The investigation results in Board conclusions issued in the form of a report or "brief" of the incident or accident. Accident/incident investigations are fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act (*5 U.S.C. 504* et seq.), and are not conducted for the purpose of determining the rights or liabilities of any person.

* * * *